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5 FRANCIS DROUILLARD, et al.,
6 Plaintiffs,
7 v.
8 LYNDY ROBERTS, et al.,
9 Defendants.

10 Case No. [24-cv-06969-CRB](#)
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**13 ORDER DENYING APPLICATION
14 FOR TEMPORARY RESTRAINING
15 ORDER**

16 The pro se Plaintiffs in this case are “California residents and registered voters.”
17 FAC (dkt. 9) ¶ 5.¹ They sue Defendants Lynda Roberts, Marin County Registrar of
18 Voters, and Shirley Weber, Ph.D., California Secretary of State, alleging that Defendants
19 are violating the Fourteenth Amendment, the National Voter Registration Act (“NVRA”),
20 and the Help America Vote Act (“HAVA”) by failing to remove ineligible voters from
21 Marin County’s voter rolls in connection with the November 5, 2024 General Election. Id.
22 ¶¶ 1, 2, 8. Plaintiffs seek a Temporary Restraining Order (“TRO”), asking the Court to
23 intervene in the election, which is already well underway. See App. for TRO (dkt. 10);
24 Proposed Order (dkt. 15) ¶ 1 (“Defendants have begun processing ballots at the Marin
County Civic Center.”). Defendants have responded, see Opp’n (dkt. 20), and the Court
held a hearing on Monday, November 4, 2024, see Motion Hearing (dkt. 29). For the
reasons discussed below, the Court DENIES the application for a TRO.

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27 ¹ Plaintiffs are Francis Drouillard, Mark Galperin, John Turna cliff, Chris Carpiniello,
28 Walter Jensen, Matthew Bennett, and Mia Camera. Id. Plaintiffs do not identify
themselves as part of any organization, and do not bring suit on behalf of any organization.

I. BACKGROUND

In a sparse complaint, Plaintiffs allege that “Marin County’s voter rolls included numerous ineligible voters who had either moved out of state or were otherwise unqualified under state and federal law.” FAC ¶ 8. Plaintiffs further allege that Defendants failed “to remove ineligible voters from the rolls,” id. ¶ 14, “fail[ed] to implement” “programs to ensure only eligible voters remain on voter registration rolls,” id. ¶¶ 16–17 (citing 52 U.S.C. § 20507(a)(4) and (b)), and allow an “excessive number of ballot errors” in Marin County’s voting systems, id. ¶ 20. In their memorandum in support of their application for a TRO, Plaintiffs add some flesh to the bones of their complaint. See Mem. (dkt. 10-1) ¶¶ 7–24. They explain that they participated in an effort by “a volunteer group called ‘Patriot Force California’” to compare “active county voter rolls” with the National Change of Address (“NCOA”) database in order “to identify active voters on California’s registered voter rolls that moved to another state before the March 5, 2024[] primary.” Id. ¶ 8.

Plaintiffs assert that “[i]n the 2024 Primary Election, 337 ballots were sent to individuals who moved out of state, and 48 of those ballots were returned and counted anyway.” Id. ¶ 2. “Plaintiffs Drouillard, Turnacliff, Bennett and Camera were among the group of canvassers for Marin County who went door to door” in Marin “to confirm the accuracy of” those numbers. Id. ¶ 9. They were only able to check 145 of the 337 names. Id. Of those 145 names, Plaintiffs assert that 140 had in fact moved. Id. (citing Drouillard Affidavit). (In fact, Drouillard’s Affidavit asserts that of the 145 names, “131 had indeed moved.” See Drouillard Affidavit (dkt. 10-2) ¶ 9.) Plaintiffs assert that “[D]efendants were given the names of the 337 registered voters that moved from the state and told that 140 of these were personally confirmed by plaintiffs.” Mem. ¶ 13; see also Drouillard Aff. Ex. F (dkt. 11-6).² “On September 27, 2024, Defendant Roberts responded but failed to address the issue of ineligible voters . . . in violation of her duty to investigate all such

² This letter was sent on Marin Election Integrity Committee letterhead to Roberts from Drouillard, who identified himself in the letter as Chair of the Marin Election Integrity Committee. See id. at 4.

1 claims.” Mem. ¶ 14; see also Drouillard Aff. Ex. G (dkt. 11-7).³ “On October 1, 2024,
2 plaintiffs again contacted Roberts,” and did not get a satisfactory response. Mem. ¶ 15; see
3 also Drouillard Aff. Exs. H (dkt. 11-8),⁴ I (dkt. 11-9).⁵

4 As to the 2024 General Election, Plaintiffs assert on information and belief “that
5 there were 337 out-of-state and 1,162⁶ out-of-county active registered voters on [the]
6 Marin County voter rolls.” Mem. ¶ 19. They further assert that Drouillard examined the
7 September 30, 2024 voter rolls, and that 89 of the 131 “confirmed out-of-state voters,” and
8 994 of the 1,162 “alleged out-of-county voters” remained on the voter rolls. Id. ¶¶ 21, 22.
9 Marin County mailed ballots to voters beginning on October 7, 2024. Id. ¶ 16. Plaintiffs
10 assert that Tony Aquilino, a Marin County elections employee, confirmed that active
11 voters on the September 30, 2024 voter rolls would be mailed ballots. Id. ¶ 23. Plaintiffs

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13 ³ In this letter, Roberts stated that the Marin County Elections Department “follows the law
14 to continually process changes to the voter registration database.” Id. at 1. She also took
15 issue with the Marin Election Integrity Committee reports, which she said “contain
16 inaccurate and misleading information.” Id. Roberts explained that the reports were based
17 on December 2023 data, which is outdated. Id. Roberts also stated that there are multiple
18 lawful “circumstances under which voters may retain a local address and live out of state,”
19 such as being temporarily away while attending school or serving in the military. Id. at 2.

20 ⁴ In this letter, on Marin Election Integrity Committee letterhead, Drouillard wrote to
21 Roberts that he “provided evidence of 337 active registered voters that were ineligible to
22 vote” because they moved out of state, 140 of whom were verified by canvassers. See id.
23 at 1. Drouillard wrote that of the 337, “219 remain on the voter rolls extracted September
24 30, 2024,” and that of the 140, “89 remain on the voter rolls.” Id. Drouillard asserted in
25 the letter that Roberts was failing to comply with the NVRA, and that “removing ineligible
26 voters is not subject to the so-called ‘Quiet-Period’ of NVRA.” Id. at 2.

27 ⁵ This is a memo from Weber to “All County Clerks/Registrars of Voters” dated
28 September 27, 2024, which Roberts apparently emailed to Drouillard. See Drouillard Aff.
¶ 20 (explaining Exhibit I). Weber wrote in the memo about “pre-election challenges by
members of the public” ahead of the General Election, specifically addressing “demands
for the immediate removal of voters.” Drouillard Aff. Ex. I at 1. The memo addressed a
number of different kinds of challenges, and problems with those challenges, stating that
the NVRA “governs the manner and timing of removing a person’s name from voter
registration rolls” Id. at 2. It also noted that “the NVRA establishes a 90-day ‘quiet
period’ or ‘blackout’ period prior to each primary or general federal election, during which
election officials are prohibited from processing and removing the names of ineligible
voters from the state’s voter rolls as part of their normal list maintenance programs.” Id. at
3. And it stated that “a voter may be removed from the voter rolls due to a change in their
residential address outside of the jurisdiction only” in certain circumstances. Id.

⁶ The 1,162 number comes from Larry Maloney, “an enthusiast about voter integrity” and
member of Patriot Force California. See Maloney Aff. (dkt. 10-3) ¶¶ 4, 5. He “personally
used [his] software to pull the names of 337 voters” for the canvassing project, and
“personally generated the list of 1,162 voter names using the NCOA database, and the
August 15, 2024[] voter rolls.” Id. ¶¶ 5, 6.

1 argue that “[i]f only a small fraction of ineligible voters cast ballots in the November 5,
 2 2024[] General Election, then excessive ballot errors will occur that render the election
 3 results unreliable.” Id. ¶ 24. They further assert that they “expect 142 of them to be cast
 4 and counted,” adding that the “maximum [number of] errors permitted in Marin is 15.” Id.
 5 ¶¶ 3, 4.⁷

6 On October 4, 2024, Plaintiffs brought suit against Defendants for declaratory and
 7 injunctive relief, alleging violations of (1) the Equal Protection Clause; (2) NVRA; and (3)
 8 HAVA. See Compl. (dkt. 1). Plaintiffs amended the complaint on October 12, 2024,
 9 maintaining the same three causes of action. See FAC. Plaintiffs then filed an application
 10 for a TRO on October 24, 2024. See App. for TRO.⁸ Plaintiffs submit with their
 11 application a Proposed TRO that would (1) order Defendants “to intercept and sequester
 12 ballots returned by ineligible voters” and (2) enjoin Defendants “from opening envelopes
 13 of ballots returned by ineligible voters, or processing or counting those ballots.” See
 14 Proposed TRO (dkt. 10-4).⁹ Defendants have responded, see Opp’n, and the Court held a
 15 hearing earlier today, see Motion Hearing.¹⁰

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17 ⁷ It is not clear where this 142 number comes from. Plaintiffs characterize it as “a fair
 18 estimate.” Id. ¶ 4.

19 ⁸ The application for a TRO appears on the docket twice, at dkt. 10 and dkt. 12.
 20 The memorandum in support of the application for a TRO includes an additional remedy
 21 that is not included in the Proposed TRO. It states: “To safeguard against inauthenticity,
 22 plaintiffs are requesting real-time AVMR-130 reports at regular intervals which will show
 23 the number of ballots challenged and sequestered for verification. . . . Once verified that
 24 they’re from ineligible voters they should remain sequestered, unopened and uncounted.”
 25 Mem. ¶ 6. Plaintiffs explain that “An AVMR-130 is a report that provides the number of
 26 returned vote-by-mail ballots sorted up until the time the report was produced as well as
 27 the party of the voter and whether the ballot is ‘good,’ ‘challenged’ or ‘undeliverable.’”
 28 Id. ¶ 18.

¹⁰ On October 28, 2024, Plaintiffs filed a Proposed Order that would have enjoined
 Defendants from “opening and counting any ballots received between now and the
 [November 4, 2024] hearing.” Proposed Order (dkt. 15) ¶ 3. The Court declined to enter
 that Proposed Order. See Order Denying Request to Enter Proposed Order (dkt. 17). On
 October 31, 2024, Plaintiffs filed an Application to Stay, which also requested significant
 injunctive relief, including the interception and sequestering of ballots from “ineligible
 voters” and the enjoining of opening, processing, or counting of ballots from “ineligible
 voters.” See App. for Stay (dkts. 23, 26); Proposed Order for Judge (dkt. 24) ¶ 1. On
 November 1, 2024, the Court held that it would “not issue the requested stay or the
 requested injunctive relief in advance of the hearing on Monday, November 4, 2024.” See
 Order re Filings re Application for Stay (dkt. 27).

II. LEGAL STANDARD

A TRO is an “extraordinary remedy” that should be awarded only upon a clear showing that the party is entitled to such relief. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). The party seeking a TRO must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3) that the balance of equities tips in the plaintiff’s favor; and (4) that an injunction is in the public interest. See id. at 20. Alternatively, the moving party must demonstrate that “serious questions going to the merits were raised,” that “the balance of hardships tips sharply in the [petitioner’s] favor,” and that the other two Winter elements are satisfied. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quotation omitted). The “[l]ikelihood of success on the merits ‘is the most important Winter factor.’” Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017) (quoting Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015)). Courts may analyze a TRO request using a sliding scale approach through which the elements of the “test are balanced, so that a stronger showing of one element may offset a weaker showing of another.” See Armstrong v. Cnty. of Placer, No. 22:1-cv-00779-KJM-KJN, 2021 WL 2258716, at *3 (E.D. Cal. May 3, 2021) (citing All. for the Wild Rockies, 632 F.3d at 1131).

Plaintiffs seeking “mandatory injunctions,” which “order[] a responsible party to take action,” must clear a higher threshold than plaintiffs seeking prohibitory injunctions, which preserve the status quo. See Hennessy-Waller v. Snyder, 529 F. Supp. 3d 1031, 1036–37 (D. Ariz. 2021) (internal quotation marks omitted), aff’d sub nom. Doe v. Snyder, 28 F.4th 103 (9th Cir. 2022). Mandatory injunctions are “particularly disfavored” and “are not granted unless extreme or very serious damage will result and are not issued in doubtful cases.” Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009) (internal quotation marks omitted).

III. DISCUSSION

Plaintiffs argue that the Court should issue the requested TRO because (A) they

1 have standing to bring suit and (B) they have satisfied the Winter factors. See Mem. The
2 Court disagrees on both points.

3 **A. Standing**

4 Plaintiffs argue that they have standing because their “constitutional right to vote is
5 impaired by the dilution of their vote resulting from counting votes of ineligible voters.”
6 Mem. ¶ 26; see also *id.* ¶ 25 (“a loss of a constitutional right constitutes actual injury.”).¹¹
7 “The question of whether a party has standing to sue under Article III is a threshold issue
8 that must be addressed before turning to the merits of a case.” Shulman v. Kaplan, 58
9 F.4th 404, 407 (9th Cir. 2023) (citing Horne v. Flores, 557 U.S. 433, 445 (2009)). In order
10 to have Article III standing, a plaintiff “must have (1) suffered an injury in fact, (2) that is
11 fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be
12 redressed by a favorable judicial decision.” Spokeo, Inc. v. Robins, 578 U.S. 330, 338
13 (2016). Defendants contend that Plaintiffs fail as to injury and redressability. See Opp’n

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15 ¹¹ Plaintiffs argued for the first time in a filing entitled “Proposed Order And Application
16 for Stay,” filed at 11:51 p.m. on October 31, 2024 (and therefore after Defendants filed
17 their opposition brief), that they also have standing because “although their papers failed to
18 sufficiently highlight it, . . . two of them are running for public office. Their races will
19 necessarily be affected, and they stand to be injured as a result.” App. for Stay ¶ 10; see also
20 Drouillard Decl. ISO Stay (dkt. 25) ¶ 3 (“Plaintiff Mark Galperin and I are candidates
21 for elected office on the ballot in the November 5, 2024 election.”). Plaintiffs repeated this
22 basis for standing at the motion hearing. This basis for standing is not in the FAC and not
23 in the application for a TRO or any of the papers supporting the application for a TRO (in
24 fact, in applying for a TRO, Plaintiffs disclaim an interest in the results of the election, see
25 Mem. ¶ 38). Plaintiffs assert that “Although these facts come before the Court for the first
26 time after the defendants’ [sic] filed their Opposition, defendants knew this and therefore
27 aren’t prejudiced by this Court’s consideration of these facts.” App. for Stay ¶ 10.
28 Whether or not “defendants knew this,” the Court did not. The Court is also entitled to
timely notice of the bases of the parties’ arguments. This is not an acceptable means by
which to introduce evidence in support of the application for a TRO.

Even if the Court did consider this late argument, Plaintiffs have not explained, much less
introduced any evidence of, why the two races allegedly involved would “necessarily be
affected” by the inclusion of some ineligible votes. Such harm—that Drouillard and
Galperin will lose their elections because of ineligible voters—is entirely hypothetical and
does not meet the “actual or imminent” requirement for standing. See Bost v. Illinois State
Board of Elections, 114 F.4th 634, 641–642 (7th Cir. 2024) (“whether the counting of
ballots received after Election Day would cause them to lose the election is speculative at
best”); Lujan, 504 U.S. at 560; see also Election Integrity Project California, Inc. v. Weber,
113 F.4th 1072, 1078, 1087 (9th Cir. 2024) (five of the plaintiffs in the amended complaint
were “unsuccessful congressional candidates”; Ninth Circuit nonetheless rejected vote
dilution theory of harm).

1 at 5–6.

2 **1. Injury**

3 To satisfy Article III’s injury requirement, a plaintiff must show that he suffered “an
4 invasion of a legally protected interest” that is “concrete and particularized” and “actual or
5 imminent, not conjectural or hypothetical.” Lujan v. Defenders of Wildlife, 504 U.S. 555,
6 560 (1992). For an injury to be “particularized,” it “must affect the plaintiff in a personal
7 and individual way.” Spokeo, 578 U.S. at 339. To be “concrete,” it must not be a “bare
8 procedural violation.” Id. at 341. “A litigant raising only a generally available grievance
9 about the government—claiming only harm to his and every citizen’s interest in proper
10 application of the Constitution and laws, and seeking relief that no more directly and
11 tangibly benefits him than it does the public at large—does not state an Article III case or
12 controversy.” Hollingsworth v. Perry, 570 U.S. 693, 705 (2013) (internal quotation marks
13 omitted). “A citizen may not sue based only on an asserted right to have the Government
14 act in accordance with law.” FDA v. Alliance for Hippocratic Medicine, 602 U.S. 367,
15 381 (2024) (internal quotation marks omitted). In voting cases specifically, only “voters
16 who allege facts showing disadvantage to themselves as individuals have standing to sue to
17 remedy that disadvantage.” Gill v. Whitford, 585 U.S. 48, 65–66 (2018) (cleaned up).

18 Plaintiffs’ assertion of injury here—that their “constitutional right to vote is
19 impaired by the dilution of their vote resulting from counting votes of ineligible voters,”
20 Mem. ¶ 26—is plainly inadequate.¹² “[W]hether evaluated in the context of Article III or
21 on the merits, the relevant principle is the same: the mere fact that some invalid ballots
22 have been inadvertently counted, without more, does not suffice to show a distinct harm to
23 any group of voters over any other.” Election Integrity Project California, 113 F.4th at
24 1089 n.13; see also Republican National Committee v. Francisco Aguilar, No. 2:24-cv-

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26 ¹² Further, any suggestion that Plaintiffs “los[t]” their “constitutional right” to vote, see
27 Mem. ¶ 25, is plainly wrong. Nothing prevents Plaintiffs from voting. See Election
28 Integrity Project California, 113 F.4th at 1089 (“the inadvertent counting of some invalid
ballots, without more, does not limit, prevent, or otherwise burden the ability of any voter
to cast a lawful ballot.”).

1 00518-CDS-MDC, 2024 WL 4529358, at *3–4 (D. Nev. Oct. 18 2024) (“Johnston’s vote
2 dilution claim is nothing more than a generalized grievance” and “can be raised by every
3 and any voter in the State of Nevada.”); Strong Cmtys. Found. of Ariz. Inc. v. Stephen
4 Richer, No. CV-24-02030-PHX-KML, 2024 WL 4475248, at *8 (D. Ariz. Oct. 11, 2024)
5 (rejecting argument, in voter list maintenance action, that individual plaintiff suffered
6 injury “because greater numbers of potentially-ineligible registrants dilute her vote” and
7 explaining that “even if [plaintiff’s] vote was ‘diluted’ in the colloquial sense plaintiffs
8 allege, that type of ‘dilution’ does not give [her] particularized injury in fact because it is
9 also suffered by every other voter.”).

10 Because Plaintiffs have no particularized injury and sue only ““to have the
11 Government act in accordance with law,”” see Alliance for Hippocratic Medicine, 602 U.S.
12 at 381, they lack standing.

13 2. Redressability

14 To satisfy Article III’s redressability requirement, a plaintiff must show that it
15 ““would benefit in a tangible way from the court’s intervention.”” DeFazio v. Hollister,
16 Inc., 636 F. Supp. 2d 1045. 1072 (E.D. Cal. 2009) (quoting Warth v. Seldin, 422 U.S. 490,
17 508 (1975) and citing Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 107 (1998)
18 (“Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal
19 court”)). Because Plaintiffs waited as long as they did—only contacting Defendants on
20 August 1, 2024 despite their concerns about the March 5, 2024 primary, see Drouillard
21 Aff. ¶¶ 5, 17, only bringing this suit on October 5, 2024, see Compl., only filing an
22 application for a TRO on October 24, 2024, see App. for TRO—the Court could not hear
23 this case (with the benefit of Defendants who had been served and able to respond) before
24 today.

25 As of today, Marin County has already processed many mail-in ballots. See
26 Roberts Decl. (dkt. 20-1) ¶ 9 (process “began as soon as mail-in ballots were returned in
27 October”), ¶ 10 (“As of 1:00 p.m. October 30, 2024, 63,389 ballots have been accepted”
28 and “[o]ver 32,500 ballots have been tabulated as of 1:00 p.m. October 29, 2024.”), ¶ 11

1 (“I estimate that as of 10:00 a.m. on November 4, 2024, over 80,000 ballots in Marin
2 County will be accepted and over 65,000 ballots in Marin County will be tabulated.”); see
3 also Proposed Order ¶ 1 (“Defendants have begun processing ballots at the Marin County
4 Civic Center.”). In the course of processing mail-in ballots, the ballots are “removed from
5 their return envelopes” and “the ballots are anonymous and cannot be tied to a specific
6 voter.” Roberts Decl. ¶ 5; see also Proposed Order ¶ 1 (“Plaintiffs are concerned that
7 ballots extracted before the hearing will prejudice this Court’s ruling because once
8 separated from the yellow return envelope it will be impossible to determine whether a
9 ballot was cast by an ineligible voter.”).

10 Because, as Plaintiffs acknowledged at the motion hearing, many mail-in ballots
11 have already been removed from their envelopes, it is too late for the Court to order
12 Defendants “to intercept and sequester ballots returned by ineligible voters” and to enjoin
13 Defendants “from opening envelopes of ballots returned by ineligible voters, or processing
14 or counting those ballots.” See Proposed TRO. Any injury is no longer redressable.¹³ For
15 that reason as well, Plaintiffs lack standing.

16 B. Merits

17 Even assuming that Plaintiffs had standing, the Court concludes that Plaintiffs fail
18 to satisfy the Winter factors for injunctive relief.

19 3. Likelihood of Success on the Merits

20 A party seeking a TRO must establish a likelihood of success on the merits.
21 Winter, 555 U.S. at 20. Plaintiffs argue that they are likely to succeed on (a) their Equal
22 Protection, Substantive Due Process, and Procedural Due Process claims; (b) their NRVA
23 claim; and (c) their HAVA claim. See Mem. ¶¶ 28–37. As an initial matter, this is

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25 ¹³ This is also true in light of the 90-day quiet period mandated in the NVRA, discussed
26 below. Plaintiffs’ request that the Court enjoin Defendants from opening or processing or
27 counting ballots, see Proposed TRO ¶ 5, would have the effect of removing those voters
28 from the voter rolls, see *Republican National Committee v. Francisco Aguilar*, 2024 WL
4529358, at *8 (“any part of plaintiffs’ request that defendants make reasonable efforts to
conduct voter-list maintenance that involves removing voters ineligible due to their change
in address is barred under Article III because it lacks redressability” in light of “90-day
blackout window”).

problematic because the complaint does not include any Due Process claims. See FAC. It includes three claims: “Violation of the Fourteenth Amendment (Equal Protection),” “Violation of the National Voter Registration Act,” and “Violation of the Help America Vote Act.” Id. ¶¶ 12–20. While courts are to hold a complaint by a pro se plaintiff to a less stringent standard than one drafted by a lawyer, see Erickson v. Pardus, 551 U.S. 89, 94 (2007), courts may not “supply essential elements of the claim that were not initially pled,” Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Plaintiffs are unlikely to succeed on claims not found within their complaint. See Jones v. Pollard, No. 21cv162-GPC(BGS), 2023 WL 4728802, at *2 n.4 (S.D. Cal. July 24, 2023) (declining to address claim that was not in complaint). Nevertheless, the Court will address each of the claims that Plaintiffs argue in their memorandum in support of their application for a TRO.

a. Equal Protection, Substantive Due Process, Procedural Due Process

i. Equal Protection

The FAC alleges that the Equal Protection Clause “safeguards voters from dilution of their votes by unlawful votes cast by ineligible voters.” FAC ¶ 13 (citing Reynolds v. Sims, 377 U.S. 533, 554–55 (1964)). It then alleges that “[b]y failing to remove ineligible voters from the rolls, Defendants have sanctioned election practices that reduce the weight and impact of votes cast by eligible voters, depriving Plaintiffs of equal protection under the law.” Id. ¶ 14. In seeking a TRO, Plaintiffs add only that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”” Mem. ¶ 28 (quoting Bush v. Gore, 531 U.S. 98, 104–05 (2000); citing Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 234 (6th Cir. 2011)).

This is very similar to the theory that the Ninth Circuit rejected in Election Integrity Project California, 113 F.4th 1072, a case about the administration of the 2020 General Election in California. In that case, the plaintiff alleged that defendants (including Weber,

1 a defendant here) “have ‘diluted’ the voting power of in-person voters and voters of certain
2 counties by failing to adequately police ballots cast by mail.” Id. at 1082. The court
3 explained that “[a]ssuming that California officials have inadvertently counted some
4 invalid [vote by mail] ballots in the past, the effect that counting such ballots had on the
5 relative voting power of all votes was the same, regardless of voting method or
6 geography.” Id. Because “[a] vote dilution claim requires a showing of disproportionate
7 voting power for some voters over others,” the plaintiff failed. Id. The court reviewed the
8 foundational vote dilution cases, and explained that “the crux of a vote dilution claim is
9 inequality of voting power—not diminishment of voting power per se.” Id. at 1087
10 (explaining that “dilution of voting power, in an absolute sense, occurs any time the total
11 number of votes increases in an election”). The plaintiff’s theory of vote dilution failed
12 because “[a]ssuming that some invalid [vote by mail] ballots have been mistakenly
13 counted as [the plaintiff] allege[d], any diminishment in voting power that resulted was
14 distributed across all votes equally.” Id.; see also id. at 1089 n.13 (“To our knowledge,
15 every court to have considered a ‘vote dilution’ claim analogous to the one raised by [the
16 plaintiff] in this case has rejected the claim.”).

17 Here, as in Election Integrity Project California, Plaintiffs do not allege “that any
18 specific candidate, issue, party, or other cognizable class of voters has disproportionately
19 benefitted from or suffered injury as a result of the invalid ballots that it alleges officials
20 have mistakenly [sent to voters].” See id. at 1088; FAC ¶ 13. Alleging that their votes
21 were diluted because of the inclusion of ineligible voters on the voting rolls is not enough.
22 See Election Integrity Project California, Inc., 113 F.4th at 1095–96. Accordingly.
23 Plaintiffs are not likely to succeed on their Equal Protection claim.

24 **ii. Substantive Due Process**

25 The FAC does not include a Substantive Due Process claim. See FAC. In seeking
26 a TRO, however, Plaintiffs argue for the first time that Defendants violated their right to
27 Substantive Due Process—because the election is being ““conducted in a manner that is
28 fundamentally unfair.”” Mem. ¶ 29 (quoting Bennett v. Yoshina, 140 F.3d 1218, 1226 (9th

1 Cir. 1998)). Plaintiffs recognize that there is a “distinction between ‘garden variety’
2 election irregularities,” which do not implicate Substantive Due Process, and “a pervasive
3 error that undermines the integrity of the vote,” which does. Id. Plaintiffs contend that the
4 Due Process Clause is implicated here because the election in Marin County has “more
5 than a few minor irregularities” and indeed “may contain well beyond 10,000 errors.” Id.
6 ¶¶ 29, 30.¹⁴

7 Election Integrity Project California is also helpful on this issue. The plaintiffs
8 there argued that election irregularities were so pervasive that they undermined
9 fundamental fairness. Election Integrity Project California, 113 F.4th at 1096. The Ninth
10 Circuit explained that garden variety irregularities “reasonably associated with the public
11 administration of elections” do not violate the Due Process Clause, even when they control
12 the outcome of an election. Id. It observed that “[g]arden variety irregularities have
13 historically included . . . ‘[m]ere fraud or mistake,’ claims of lax security,’ absentee ballots
14 delivered by persons other than the voter, human and/or mechanical error resulting in
15 miscounted ballots . . . the counting of some votes that were illegally cast, . . . and the
16 mistaken allowance of non-party member votes in a primary election.” Id. (internal
17 citations omitted) (emphasis added). Irregularities that went beyond “garden variety”
18 included “the disenfranchisement of an entire electorate through the failure to hold a
19 legally required election, ‘outrageous racial discrimination’ resulting in a complete ‘lack of
20 integrity’ in the election, and knowing efforts by election officials ‘to prevent an honest
21 count . . . of the votes lawfully cast’ in an election.” Id. at 1096–97 (internal citations
22 omitted). The Ninth Circuit concluded that the allegations there—including that
23 “thousands of ineligible registrants have incorrectly remained on the voter rolls” and that
24 “thousands of [vote by mail] ballots have been mailed to . . . individuals who were likely

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¹⁴ Plaintiffs do not explain how they get to “well beyond 10,000 errors,” and it is Plaintiffs’ burden to support their contentions. See Winter, 555 U.S. at 20 (“A plaintiff . . . must establish . . .”); see also Wright & Miller, Federal Practice and Procedure § 2949 (3d ed. 2024) (“Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction.”).

1 ineligible to vote”—did not rise to the level of Due Process violations. Id. at 1097–98.
2 While such allegations “undoubtedly describe purported errors in the administration of
3 California’s elections,” they “fail[] to draw a plausible connection between these errors
4 and any ‘massive disenfranchisement’ of voters or ‘pervasive’ counting of invalid ballots.”
5 Id. at 1098. The number of invalid ballots alleged to have been counted were “so
6 exceedingly minute as to have no measurable impact” on the fairness of California’s
7 election. Id.

8 Here, setting aside Plaintiffs’ unsupported assertion about “10,000 errors,” Plaintiffs
9 have asserted only that 89 “confirmed out-of-state voters,” and 994 “alleged out-of-county
10 voters” remained on the voter rolls. Mem. ¶¶ 21–22. Importantly, there is no reason to
11 believe that these 89 or 994 individuals are all ineligible voters.¹⁵ Not all voters who
12 change their address are ineligible to vote: a voter does not necessarily lose his residency if
13 he moves to another state, and the California Elections Code specifically allows voters to
14 temporarily change a mailing address but maintain their domicile for purposes of voting if,
15 for example, they are attending school or serving in the military elsewhere. See, e.g., Cal.
16 Elec. Code. § 2021(a) (“A person who leaves his or her home to go into another state or
17 precinct in this state for temporary purposes merely, with the intention of returning, does
18 not lose his or her domicile.”), § 2025 (“A person does not . . . lose a domicile solely by
19 reason of his or her . . . absence from a place while employed in the service of the United
20 States or of this state . . . nor while a student of any institution of learning, nor while kept
21 in an almshouse, asylum or prison.”); see also Drouillard Aff. Ex. G at 2 (Roberts
22 explaining this to Drouillard on September 27, 2024).

23 Even accepting the problematic number that Plaintiffs posit, not all 994 ballots will
24 be returned. Plaintiffs assert without support that they expect 142 of the 994 ballots “to be
25

26 ¹⁵ It is also unclear whether these numbers are accurate even as a statement of how many
27 voters still on the voting rolls have left the county/state, given Roberts’ contention that
28 Plaintiffs’ numbers are based on outdated information, extracted in December 2023. See
Drouillard Aff. Ex. G at 1. Maloney states that the 1,162 number was based on “the
August 15, 2024 voter rolls.” Maloney Aff. ¶ 6.

1 cast and counted.” Mem. ¶ 4. Maloney states that “[a]ny election results which can
2 include votes from even 1/10 of the 994 ineligible voters is a seriously flawed election, on
3 a scandalous level.” Maloney Aff. ¶ 8. The Court is unconvinced. 99 ineligible voters
4 would amount to 0.058% of the 172,000 voters currently registered in Marin County. See
5 County of Marin, News Release – Bookmark Our Election Results Webpage,
6 <https://www.marincounty.gov/news-releases/bookmark-our-election-results-webpage>
7 (visited Oct. 29, 2024) (“Marin County has about 172,000 registered voters for this
8 election.”). Presumably not all of the 172,000 registered Marin County voters will vote,
9 however. In 2020, when there were 175,220 registered Marin County voters, there were
10 158,103 ballots cast, or 90.23%. See County of Marin, Official Final Election Results,
11 <https://results.enr.clarityelections.com/CA/Marin/107124/web.264614/#/summary> (last
12 updated Dec. 17, 2020). If 90.23% of this year’s registered voters vote, that would be
13 155,195.6 ballots cast.¹⁶ 99 ineligible voters would amount to 0.064% of the voters in
14 Marin County.

15 While any number of votes by ineligible voters is undesirable, this small a
16 percentage is akin to the “counting of some votes that were illegally cast” example given
17 in Election Integrity Project California, 113 F.4th at 1096–97. The case involving “some
18 votes that were illegally cast” was Pettengill v. Putnam County R-1 School District,
19 Unionville, Mo., 472 F.2d 121 (8th Cir. 1973). See id. at 1096 (citing Bennett v. Yoshina,
20 140 F.3d 1218, 1226 (9th Cir. 1998) (citing Pettengill, 472 F.2d at 122)). In Pettengill,
21 there were only “five electors personally voting and six electors casting absentee ballots
22 who were not qualified to vote because they did not satisfy the residency requirements
23 prescribed by law” and “two electors [who] were not qualified to vote because they were
24 not of lawful age when they applied for absentee ballots,” so just 13 illegal votes. 472
25 F.2d at 122. But the total number of votes in that case was also small: “1,466 votes were
26 cast in favor of the proposition, [and] 726 [were] cast against,” so 2,192 total. Id. 13

27
28 ¹⁶ Roberts estimates that “approximately 143,000 mail ballots will be submitted for this
election.” Roberts Decl. ¶ 11. She does not estimate the total number of ballots cast.

illegal votes is 0.59% of the 2,192 total votes cast—a larger percentage than Plaintiffs hypothesize here, with the 99 invalid votes that Maloney deems “scandalous.” See Maloney Aff. ¶ 8.

Moreover, 99 votes from ineligible voters in an election in which 155,195.6 ballots are cast does not represent “the disenfranchisement of an entire electorate through the failure to hold a legally required election,” “outrageous racial discrimination,” or “knowing efforts by elections officials ‘to prevent an honest count . . . of the votes lawfully cast.’” See Election Integrity Project California, 113 F.4th at 1097. In Bennett, the Ninth Circuit explained that “a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.” 140 F.3d at 1226–27, n.3. There was “no disenfranchisement or meaningful vote dilution” in that case because “[e]very ballot submitted was counted, and no one was deterred from going to the polls.” Id. at 1227. Here too, where no one is disenfranchised by the inclusion of 99 votes by ineligible voters, the election is not fundamentally unfair.

Accordingly, Plaintiffs are unlikely to prevail on a Substantive Due Process claim.

iii. Procedural Due Process

The FAC does not include a Procedural Due Process claim. See FAC. In seeking a TRO, however, Plaintiffs argue for the first time that Defendants violated their right to Procedural Due Process because Defendants “knowingly and intentionally departed from the [NVRA], which requires the removal of registrants that moved outside the registrar’s jurisdiction, [HAVA], which requires that voter roll databases contain only the registrations of qualified citizens residing in that state, and the Cal. Elec. Code § 349[,] which requires a registrant to reside in the precinct they are registered.”¹⁷ Mem. ¶ 33.

¹⁷ That is not what California Election Code § 349 says. It says, in part, that “[t]he domicile of a person is that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning.” Cal. Elec. Code § 349(b). That section is consistent with the

1 Plaintiffs assert that this “dilute[d] every eligible vote,” and that “there was no attempt to
2 hold a hearing or to afford plaintiffs an opportunity to be heard.” Id.

3 Defendants argue that any Procedural Due Process claim fails because Plaintiffs are
4 essentially challenging a state’s election procedures, which requires Plaintiffs to show that
5 the “nature and extent of the alleged burden on the right to vote” outweighs “the State’s
6 interest in maintaining its chosen system of election administration.” Opp’n at 10 (quoting
7 Election Integrity Project California, 113 F.4th at 1083). Defendants reason that Plaintiffs’
8 asserted burden—that their votes will be diluted—fails, because the burden on their right
9 to vote is nonexistent. Id. (quoting Election Integrity Project California, 113 F.4th at
10 1089).

11 To make out a Procedural Due Process claim, a plaintiff must identify a
12 constitutionally protected liberty or property interest, a deprivation of that interest by the
13 government, and a lack of process. See Shanks v. Dressel, 540 F.3d 1082, 1090 (9th Cir.
14 2008). Presumably, the interest Plaintiffs point to is their right to vote. But Plaintiffs have
15 not experienced any deprivation of that right. They are able to vote. See Election Integrity
16 Project California, 113 F.4th at 1089. The “inadvertent counting of some invalid ballots”
17 does not “burden the ability of any voter to cast a lawful ballot.” Id. This is fatal to any
18 Procedural Due Process claim. Because the government did not deprive Plaintiffs of a
19 liberty or property interest, Plaintiffs were not entitled to any particular process.¹⁸

20 Accordingly, Plaintiffs have failed to demonstrate that they are likely to prevail on a
21 Procedural Due Process claim.

22
23 code sections discussed above, like California Election Code § 2021(a), which allows
24 voters to temporarily change a mailing address but maintain their domicile for purposes of
25 voting if, for example, they are attending school or serving in the military elsewhere.
26 California Election Code § 349 allows for the fact that “[a]t a given time, a person may
27 have more than one residence.” Cal. Elec. Code § 349(c).

28 ¹⁸ This is therefore unlike Rivera-Powell v. N.Y.C. Bd. of Elections, 470 F.3d 458, 460–61
(2d Cir. 2006), a case Plaintiffs cite. See Mem. ¶ 32. In Rivera-Powell, 470 F.3d at 460–
61, the plaintiff was a candidate for judge, and was removed from the ballot; because the
board provided her with a pre-deprivation hearing, the court held that there was no
Procedural Due Process violation. Plaintiffs here have not articulated an interest that is
anything like a judicial candidate being removed from a ballot.

b. NVRA

The FAC alleges that the NVRA requires states to “conduct programs to ensure only eligible voters remain on voter registration rolls,” and that “Defendants’ failure to implement these programs . . . has allowed thousands of ineligible voters to remain on the voter rolls.” FAC ¶¶ 16–17. To be clear: the FAC offers no support for the “thousands of ineligible voters” allegation, and the memorandum in support of the application for a TRO abandons that allegation entirely. See FAC; Mem. It states instead that 89 “confirmed out-of-state voters,” and 994 “alleged out-of-county voters” remain on the voter rolls. See Mem. ¶¶ 21, 22. It also argues that “the Registrar has knowingly and intentionally departed from the [NVRA], 52 U.S.C. § 20507(d), which requires the removal of registrants that moved outside the registrar’s jurisdiction.” Id. ¶ 33. It goes on to state that the NVRA mandates that the state ““shall conduct a general program that makes a reasonable effort to remove the names of ineligible voters . . . by reason of—(A) the death of the registrant; or (B) a change in the residence of the registrant. . . .”” Id. ¶ 34 (quoting 52 U.S.C. § 20507(a)(4)). And it argues that “the registrar’s complete failure to make a reasonable effort to update the voter rolls, including failure to remove those who have moved out of state . . . is not a reasonable effort to maintain accurate voter rolls.” Id. ¶ 35 (citing *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018)).

But Defendants do have programs in place to remove ineligible voters, as evidenced by some of Plaintiffs' own exhibits. For example, Roberts wrote to Drouillard on September 27, 2024, stating: “[t]hese record updates are prompted by notification from voters themselves and official government sources, including the United States Postal Service’s National Change of Address (NCOA) program.” Drouillard Aff. Ex. G at 1. That letter also stated:

The Elections Department follows the law to continually process changes to the voter registration database, as required, the include processing canceled and inactive voters, deceased voters, those who haven't voted in two consecutive federal general elections, those who don't provide adequate information on their registration form, and those whose mail is returned as undeliverable. On average, our staff processes and maintains

1 approximately 5,200 records per month.

2 Id. The September 27, 2024 memo from Weber to All County Clerks/Registrars of Voters
3 also states that “the Secretary of State and county election officials diligently maintain
4 California’s voter rolls using the most recent data available from various government
5 agencies.” Drouillard Aff. Ex. I at 1; see also Drouillard Aff. Ex. J (dkt. 11-10) (8/12/24
6 Weber memo to All County Clerks stating that “the Secretary of State will continue to
7 provide National Change of Address (NCOA) data to each county elections official”).

8 In connection with their opposition brief, Defendants submitted further evidence of
9 their efforts to maintain accurate voter rolls. Roberts declared that her office complies
10 with the NVRA, and that the Secretary of State regularly sends Marin County information
11 from NCOA through the statewide voter registration database, pursuant to California law.
12 Roberts Decl. ¶ 3. Roberts declared that she and her staff take different actions based on
13 whether a voter’s changes of address is within Marin, to a different California county, or
14 outside of California. Id. ¶¶ 3–6. And Roberts declared that her office takes separate steps
15 if the notice of a change of address comes from a voter him- or herself. Id. ¶ 7.

16 Plaintiffs fail to articulate why the efforts described here to maintain Marin
17 County’s voter rolls are not “reasonable” or why they do not comply with 52 U.S.C. §§
18 20507(a)(4), 20507(c)(1),¹⁹ or 20507(d)(3). And Defendants’ evidence contradicts
19 Plaintiffs’ unsupported assertion of a “complete failure to make a reasonable effort to
20 update the voter rolls.” See Mem. ¶ 35. Although Plaintiffs complained again at the
21 motion hearing that Defendants are taking too long to remove from the voter rolls voters
22 who have changed their residence, the NVRA envisions a careful and deliberate—i.e., not
23 immediate—process. See 52 U.S.C. § 20507(d)(1).

24 Plaintiffs’ real objection is to Defendants’ failure to purge voters in response to
25 Plaintiffs’ demands that they do so. See, e.g., Drouillard Aff. ¶ 19 (“On Friday, September
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27 ¹⁹ Section 20507(c)(1) in fact states that “[a] State may meet the requirement of subsection
28 (a)(4) by establishing a program under which . . . change-of-address information supplied
by the Postal Service through its licensees is used to identify registrants whose addresses
may have changed.” This is just what Defendants appear to do.

1 27, 2024, after I prompted her a third time, Defendant Roberts responded but failed to
2 address the issue of ineligible voters despite being able to easily corroborate it on her own,
3 consistent with her duty to investigate all such claims.”). But Defendants did not have in
4 September of 2024—and certainly do not have now, in November of 2024—an obligation
5 to purge voters from the voter rolls in response to Plaintiffs’ inquiries.

6 To the contrary, it is clear under the NVRA that “[a] State shall complete, not later
7 than 90 days prior to the date of a . . . general election. . . any program the purpose of
8 which is to systematically remove the names of ineligible voters from the official lists of
9 eligible voters.” See 52 U.S.C. § 20507(c)(2)(A); see also U.S. Dep’t of Justice, Voter
10 Registration List Maintenance: Guidance under Section 8 of the National Voter
11 Registration Act, 52 U.S.C. § 20507 (Sept. 2024) at 4 (90-day quiet period “applies to list
12 maintenance programs based on third-party challenges derived from any large,
13 computerized data matching process.”). While there are exceptions in place that allow for
14 removal within the 90-day period for certain reasons, the “change of residence of the
15 registrant” is not one of those reasons. See 52 U.S.C. § 20507(c)(2)(B) (90-day period
16 “shall not be construed to preclude” removal “at the request of the registrant,” “by reason
17 of criminal conviction or mental incapacity,” or “the death of the registrant”); see also
18 Republican National Committee v. Francisco Aguilar, 2024 WL 4529358, at *8 (“the
19 ninety-day prohibition from removing names of ineligible voters from official lists applies
20 only to those voters who are being removed due to a change of address.”); Arcia v.
21 Detzner, 908 F. Supp. 2d 1276, 1282 (S.D. Fla. 2012) (“registrants who become ineligible
22 because of a change in residence may not be removed during the 90-day period.”),
23 reversed on other grounds by Arcia v. Florida Sec’y of State, 772 F.3d 1335 (11th Cir.
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1 2014).²⁰ ²¹ The reason Congress chose not to allow for systematic removal of voters

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3 ²⁰ A state may also remove, within the 90-day period, a voter from its voter rolls based on
 4 an individualized, rather than systematic, process. See Mi Familia Vota v. Fontes, 691 F.
 5 Supp. 3d 1077, 1093 (D. Ariz. 2023). But Plaintiffs' process here in identifying the 89 and
 6 994 voters was based on software that compared "the database used by the Postal Service,
 7 [NCOA] database, with the active voter rolls in Marin County." Drouillard Aff. Ex. E ¶ 5.
 That is a systematic, rather than individualized, process. See Arcia, 772 F.3d at 1344
 (individualized assessment would rely on "individualized information or investigation to
 determine which names from the voter registry to remove"; process that used "a mass
 computerized data-matching process to compare the voter rolls with other state and federal
 databases" was systematic).

8 ²¹ The Court recognizes that there is some question as to whether a state can remove
 9 noncitizens from its voting rolls within 90 days of an election. Compare RJD Ex. E (dkt.
 10 22-5) (Supreme Court order in Beals v. VA Coalition for Immigrant Rights staying E.D.
 Va. order that would have blocked Virginia from removing alleged noncitizens from voter
 11 rolls within 90 days of election) with Mi Familia Vota, 691 F. Supp. 3d at 1092-93
 (systematic removal of noncitizens violates 90-day quiet period). However, this case is not
about noncitizens. See FAC (dkt. 9) ¶ 8 (case is about voters who moved out of state).

12 Beals is without question a case about purported noncitizens. See RJD Ex. A (dkt. 22-1)
 13 (Virginia Executive Order No. 35) at 4 (re comparing lists of non-citizens to voter rolls);
 14 RJD Ex. B (dkt. 22-2) (VA Coalition for Immigrant Rights Complaint in Beals) ¶ 2 ("In a
 15 purported effort to flag potential noncitizens . . ."); RJD Ex. C (dkt. 22-3) (government
 16 Complaint in Beals) at 4 (re "Virginia's Process to Remove Alleged Noncitizens");
 17 Virginia Coalition for Immigrant Rights v. Beals, No. 24-2071, 2024 WL 4601052, at *1
 18 (4th Cir. Oct. 27, 2024) (rejecting argument that "the Quiet Period Provision does not
 cover noncitizens at all"); RJD Ex. D (dkt. 22-4) (Emergency Application for Stay) at 1
 (framing district court order below as ordering Appellants "to place over 1,600 self-
 19 identified noncitizens back onto Virginia's voter rolls" and "forcing noncitizens back on
 20 the ballot" based on "a provision of the [NVRA] that does not even apply to the removal of
 21 noncitizens and other voter registrations that are void ab initio."), 14 ("The NVRA's Quiet
 22 Period Provision does not apply to removal of noncitizens.").

23 Even the Defendants in Beals recognized that "a voter could become ineligible because he
 24 has moved away," and that the quiet period in the NVRA "restricts programs with the
 25 purpose of systematically removing voters—those who voted or had the legal right to vote
 26 but who are no longer qualified to vote." Opp'n to MPI (dkt. 92) at 24 in Virginia
 27 Coalition for Immigrant Rights v. Beals, Case No. 1:24-cv-01778 (E.D. Va. Oct. 22, 2024)
 (cleaned up). The Defendants there argued that noncitizens "are not 'voters' at all," and so
 the quiet period does not apply to the purging of nonvoters from voter rolls. Id. at 24-25
 ("Therefore, States are free to systematically remove noncitizens, minors, and fictitious
 persons within 90 days of an election without running afoul of the NVRA."). In their
 Emergency Application for a Stay before the Supreme Court, Appellants argued that the
 90-day quiet period did not apply to removal of noncitizens, but they also stated: "The
 Quiet Period Provision incorporates three of the four exceptions from the General Removal
 Provision. . . . It does not permit removing registrants based on a change in residence."
 RJD Ex. D at 16 (emphasis added); see also id. at 20 ("the Quiet Period Provision restricts
 programs with the 'purpose' of 'systematic[ally] removing voters—those who 'vote[d] or
 ha[d] the legal right to vote,' but who are no longer 'qualified' to vote in a given election
 (for instance, because they moved to a different jurisdiction).") (emphasis added).

28 Whether or not the quiet period applies to the removal from voting rolls of noncitizens,
 there is no real debate as to whether it applies to the removal from voting rolls of citizens

within 90 days of an election is that “[i]n the final days before an election . . . the calculus changes” and “[e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State’s errors in time to vote.” Arcia, 772 F.3d at 1346.

Because Defendants have programs in place that “make a reasonable effort” to remove the names of ineligible voter from the voter rolls, and because Plaintiffs seek a systematic removal of voters within 90 days of the General Election based on their change of address, Plaintiffs are unlikely to prevail on their NVRA claim.

c. HAVA

The FAC alleges that “HAVA establishes error rate limits for voting systems and requires each state to maintain accurate voter rolls by regularly removing ineligible voters.” FAC ¶ 19 (citing 52 U.S.C. § 21081(a)(5)). It then alleges that “[t]he excessive number of ballot errors generated by votes cast by ineligible voters in Marin County exceeds the error rate permitted under HAVA.” Id. ¶ 20. In seeking a TRO, Plaintiffs elaborate a bit, stating that HAVA permits “only one voting system error per 500,000 ballot positions,” and that “Defendants’ failure to remove ineligible voters has generated an excessive number of ballot errors in Marin County elections historically and is almost certainly going to for the impending election.” Mem. ¶¶ 36, 37 (citing 52 U.S.C. § 21081(a)(5) and section 3.1.2 of the voting system standards issued by the Federal Election Commission).

HAVA does not create a private right of action. See Order (dkt. 53) at 10 in Paralyzed Veterans of Am. v. McPherson, Case No. C 06-4670 SBA (Nov. 28, 2006) (“HAVA does not itself create a private right of action.”) (citing Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 572 (6th Cir. 2004); Taylor v. Onorato, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006); Florida Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1077 (N.D. Fla. 2004)); see also Crowley v. Nevada ex rel. Nevada Sec'y of State, 678 F.3d 730, 736 n.4 (9th Cir. 2012) (“case law casts doubt on [assumption that Congress

1 intended to create a private right of action under HAVA]) (citing Brunner v. Ohio
2 Republican Party, 555 U.S. 5, 6 (2008) (per curiam); Sandusky, 387 F.3d at 572)).

3 Even if HAVA created a private right of action,²² Plaintiffs' interpretation of
4 HAVA is flawed. HAVA provides that "The error rate of the voting system in counting
5 ballots . . . shall comply with the error rate standards established under section 3.2.1 of the
6 voting systems standards issued by the Federal Election Commission." 52 U.S.C. §
7 21081(a)(5). But HAVA specifically defines a "voting system" as "the total combination
8 of mechanical, electromechanical, or electronic equipment (including the software,
9 firmware, and documentation required to program, control, and support the equipment)"
10 used in voting and "the practices and associated documentation used" "to identify system
11 components," "to test the system during its development and maintenance," "to maintain
12 records of system errors and defects," "to determine specific system changes to be made to
13 a system after the initial qualification of the system," and "to make available any materials
14 to the voter." 52 U.S.C. § 21081(b). The applicable Federal Election Commission
15 standards also relate to equipment. See Voting System Standards Volume 1: Performance
16 Standards, Federal Election Commission (April 2002) at §§ 3.1 (re "machines and
17 manufactured devices that are part of a voting system"), 3.2.1 (re accuracy requirements
18 for a voting system); see also id. § 1.5.1 (defining "Voting System").²³ Plaintiffs'
19 interpretation of 52 U.S.C. § 21081(a)(5) as applying to voter rolls, or ballots cast by
20 ineligible voters, has no basis in the statute.

21 Accordingly, Plaintiffs are unlikely to prevail on a HAVA claim.

22 Because Plaintiffs have not demonstrated that they are likely to prevail on any of
23 their claims, they have not satisfied Winter, 555 U.S. at 20. The Court nonetheless
24 addresses the other Winter factors.

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27 ²² Plaintiffs stated at the motion hearing that they do not seek a private right of action.
28 ²³ Available at

https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf (last visited Nov. 1, 2024).

4. Irreparable Harm

A TRO is not warranted absent a showing that “irreparable injury is likely in the absence of an injunction.” Winter, 555 U.S. at 20. A party claiming irreparable harm must establish that remedies available at law, such as monetary damages, are inadequate to compensate them for their harm. See Herb Reed Enter., LLC v. Fla. Ent. Mgmt., Inc., 736 F.3d 1239, 1249–50 (9th Cir. 2013).

Plaintiffs argue that they will suffer irreparable harm if the Court fails to grant the TRO: “Plaintiffs do not assert their right to win the election; they assert their right to a fair election and the voters’ right to cast an accurate and valid vote.” Mem. ¶ 38. They argue that “The loss of these rights satisfies the irreparable harm requirement.” Id. (citing Elrod v. Burns, 427 U.S. 347, 373 (1976) (loss of constitutional rights even for minimal crime is irreparable injury), Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073 (N.D. Fla. 2004) (“A person who is denied the right to vote suffers irreparable injury.”)). And they add that “[d]ilution of the right to vote, just as a complete denial of an eligible vote, is irreparable harm.” Id. ¶ 39.

But “the inadvertent counting of some invalid ballots, without more, does not limit, prevent, or otherwise burden the ability of any voter to cast a lawful ballot consistent with their voting preference.” Election Integrity Project California, 113 F.4th at 1089. The Ninth Circuit has rejected this vote dilution theory and held that “[t]he burden on the right to vote [that Plaintiffs allege] is . . . no burden at all.” See id. Because “the fundamental ‘right to vote’” is not “at stake in [this] action,” Plaintiffs have not demonstrated irreparable harm. See Marchant v. New York City Bd. of Elections, 815 F. Supp. 2d 568, 578 (E.D.N.Y. 2011).

Plaintiffs have not demonstrated that they face a likelihood of irreparable harm absent preliminary relief. See *Winter*, 555 U.S. at 20.

5. Balance of Equities and Public Interest

The remaining Winter factors are the balance of equities and the public interest. See Winter, 555 U.S. at 20. In weighing the balance of equities, the Court must consider

1 the seriousness of the injuries that could result to either side if the Court grants or denies
2 the requested relief. Id. at 26. As for the public interest, the Court may only grant
3 injunctive relief if “the public interests” that favor granting it “outweigh other public
4 interests that cut in favor of not issuing” it. Alliance for the Wild Rockies, 632 F.3d at
5 1138.

6 Plaintiffs argue that the balance of equities tips in their favor because “[o]n the one
7 side are plaintiffs’ constitutional rights, and on the other, there is absolutely no inequity.
8 Defendants are being asked to do their job.” Mem. ¶ 40. This argument is unpersuasive,
9 as the Court concludes that Plaintiffs’ constitutional rights are not being impacted, see
10 Election Integrity Project California, 113 F.4th at 1089, and that Defendants are already
11 doing their job. There is therefore no injury to Plaintiffs if the Court denies injunctive
12 relief. On the other hand, notwithstanding Plaintiffs’ assertions at the motion hearing that
13 their requested relief would not disrupt the vote counting process, the evidence before the
14 Court is that “[i]f the [C]ourt were to grant the relief requested, it would severely disrupt
15 [Marin County’s] ability to process the remaining ballots received,” Roberts Decl. ¶ 12.
16 Roberts “would have to immediately halt the processing of all ballots,” her staff “would
17 have to manually search through 25,000 to 35,000 envelopes to locate the appropriate
18 ballots,” which “would take approximately three days if [the] full staff participated.” Id.
19 Roberts states that “In the 2020 election, [she] was able to certify the election one day
20 prior to the deadline, with [her] staff working weekends.” Id. She “does not believe it
21 would be possible to halt ballot processing for three days and meet the required
22 certification deadline for this election.” Id. This leads the Court to discussion of the
23 public interest factor.

24 Plaintiffs argue as to the public interest that Plaintiffs “and the People of Marin
25 County all have an interest in a fair election which reflects their vote accurately.” Mem. ¶
26 41. Plaintiffs fail to persuade the Court that their desired injunction would serve the public
27 interest—particularly as Plaintiffs have failed to show that the election process is
28 fundamentally unfair. Moreover, courts have long recognized that “election cases are

1 different from ordinary injunction cases. . . . Interference with impending elections is
2 extraordinary" and "interference with an election after voting has begun is unprecedented."
3 Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 919 (9th Cir. 2003)
4 (en banc); see also Arizona Democratic Party v. Hobbs, 976 F.3d 1081, 1086 (9th Cir.
5 2020) ("as we rapidly approach the election, the public interest is well served by
6 preserving Arizona's existing election laws, rather than by sending the State scrambling to
7 implement and to administer a new procedure for curing unsigned ballots at the eleventh
8 hour."). Administering an election is "complicated and difficult." See Merrill v. Milligan,
9 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (adding that "state and local
10 election officials need substantial time to plan for elections."). Roberts has articulated just
11 how disruptive Plaintiffs' desired injunctive relief would be to the administration of this
12 election. Roberts Decl. ¶ 12. The public interest is not served by this Court ordering
13 Defendants to intercept and sequester ballots, enjoin Defendants from opening, processing,
14 or counting ballots, or issuing AVMR-130 reports. Defendants have an election to
15 administer—pursuant to federal and California law, and without interference from this
16 Court.

17 Accordingly, Plaintiffs have not demonstrated that the balance of equities tips in
18 their favor or that an injunction is in the public interest. See Winter, 555 U.S. at 20.

19 **IV. CONCLUSION**

20 Because Plaintiffs lack standing and fail to meet the requirements for injunctive
21 relief, the Court DENIES their application for a TRO.

22 **IT IS SO ORDERED.**

23 Dated: November 4, 2024



24 CHARLES R. BREYER
United States District Judge

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